

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Petition of Franklin W. Olin College of Engineering

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D.T.E. 01-95

**OPPOSITION OF THE WELLESLEY MUNICIPAL LIGHT PLANT TO  
BOSTON EDISON COMPANY’S MOTION FOR AN EXPEDITED ORDER  
TO MAINTAIN THE STATUS QUO ANTE**

Wellesley Municipal Light Plant (“WMLP”) submits this memorandum in response to the Reply of Boston Edison Company, d/b/a NSTAR Electric (“Boston Edison”), to Franklin W. Olin College of Engineering’s (“Olin College”) and Wellesley Municipal Light Plant’s (“WMLP”) Oppositions to an Expedited Order to Maintain Status Quo Ante. WMLP respectfully requests that the Department of Telecommunications and Energy (“Department”) strike Boston Edison’s Reply and deny the motion for the reasons stated in WMLP’s Opposition.

**I. The Filing of Boston Edison’s Reply is Not Permitted Under the Department’s Regulations.**

WMLP respectfully requests that the Department strike Boston Edison’s Reply (“Reply”) from the record because the filing of Boston Edison’s Reply does not comply with the Department’s motion procedure established by 220 CMR § 1.04(5)(c). That regulation states:

(c) Motion Prior to Hearing. A motion shall be in writing and may be filed prior to hearing by any party or by a person whose petition filed pursuant to 220 CMR 1.03(1) is pending. Any party may file a written answer to such motion within five days of such filing.

220 CMR § 1.04(5)(c). This procedure provides no right or even an opportunity for the moving party to submit a reply to an answer to a motion. Accordingly, Boston Edison’s filing of its Reply is improper

and should not be considered by the Department. Given this important fact, Boston Edison should have to reimburse WMLP for its costs in responding to Boston Edison's so-called Reply. In the event the Department does consider Boston Edison's Reply, WMLP responds as follows.

**II. The Arguments Raised by Boston Edison in Its Reply Do Not Justify the Relief Requested in its Motion.**

A. Boston Edison Seeks to Change the Status Quo.

Contrary to its assertion, it is Boston Edison through its motion that seeks to change the status quo, not preserve it. Boston Edison requests an Order from the Department requiring, *inter alia*, Olin College to accept service from Boston Edison. See Boston Edison Reply, at 3. Boston Edison cannot justify the relief sought on the pretext of preserving the status quo from a factual standpoint because Boston Edison never has served the buildings in question as set forth in Olin College's November 9, 2001 Petition to the Department ("Petition") or that particular geographical area. In fact, Olin College purchased the property in question from Babson College and it has been WMLP and not Boston Edison that always has served Babson College and this area of Needham.

Nonetheless, Boston Edison insinuates that it has an absolute right to serve Olin College because it is "undisputed that Olin is a customer located in Needham." However, Boston Edison's right to provide electric service to Olin College has yet to be decided. That is the central issue of Olin College's pending Petition. And in fact, it is Boston Edison that is trying to impermissibly impinge and intrude upon WMLP's service territory. For these reasons, Boston Edison cannot support its request to return to the "legal" status quo. Rather, the status quo here is for WMLP to continue to provide electric service through Babson College until Olin College's Petition is resolved.

Boston Edison's unfounded fear that WMLP either is installing or planning to install permanent facilities to serve Olin College has absolutely no bearing on the issues presented in its motion. Boston Edison has not alleged, nor can it, that Olin College has removed any of Boston Edison's facilities in order to support its request to return to the status quo. Indeed, no such Boston Edison facilities exist. Further, WMLP denies that it has installed any such equipment for the permanent provision of service, but in any event, WMLP vows and has vowed from the outset to abide by the Order of the Department in this docket. WMLP has set forth this fact in such letters as: Rubin and Rudman's November 29, 2001 letter to Ms. Mary Cottrell, Secretary of the Department; Mr. Richard F. Joyce's, Director of WMLP letter to Mr. Lawrence W. Milas, President, F. W. Olin Foundation, (See WMLP Response to BE-2.2.1 Exhibit 2); and Mr. Donald H. Newell's, WMLP's Supervisory Electrical Engineer, August 27, 2001 letter to Mr. Stephen P. Hannabury, Vice President for Administration and Finance, Franklin W. Olin College of Engineering. Id. See also WMLP's response to BE-2-26. If anything, the fact that Olin College has indicated that "whatever risk it is taking...is its own" (see Boston Edison's Reply, at 4) only goes to show that Olin College has every intention of abiding by the Department's Order. Based on these facts, it is clear that the status quo is to permit WMLP and Olin College to continue with the current arrangement. Boston Edison, therefore, advances no valid reason to grant its request for injunctive relief.

B. A Ruling on the Service Territory Issue Is Premature.

Boston Edison effectively asks the Department to make a ruling on whether Olin College falls within Boston Edison's exclusive territory. This is the very issue that will be decided in Olin College's petition and there is absolutely no reason for the Department to make this determination now. Boston Edison's motion cannot be treated as a motion for summary judgment pursuant to 220 CMR § 1.06(e).

First, Boston Edison fails to meet the prerequisites established by 220 CMR § 1.06(e) because Boston Edison's motion does not set forth in detail such supporting facts as would be admissible in evidence.

Second, Boston Edison fails to meet the standard for granting summary judgment. Summary judgment may be granted by an administrative agency where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision. Massachusetts Outdoor Advertising Council v. Outdoor Advertising Bd., 9 Mass. App. Ct. 775, 785-786 (1980); see also Hess & Clark Div. of Rhodia, Inc. v. Food & Drug Admin., 495 F.2d 975, 985 (1974). In determining whether to grant a motion for summary judgment, the Department will review the initial pleadings, pre-filed testimony, responses to discovery, and the memoranda of the parties. IMR Telecom, D.P.U. 89-212, at 12 (1990). The Department has stated that summary judgment is appropriate if a review of the materials on file shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Cambridge Electric Light Company/MIT, D.P.U. 94-101/95-36 (1995), citing Re Altresco Lynn, Inc. /Commonwealth Electric Company, D.P.U. 91-142/91-153, at 10 (1991).

Clearly, Boston Edison does not come close to satisfying this standard because discovery has not been completed and several issues of material fact still are in dispute. Boston Edison, in footnotes 1, 2, and 3 in its January 31, 2002 Motion ("Motion") and in footnote 6 in its Reply, raises a number of issues of material fact. These are just some of the examples of the material facts that are in dispute. Further, Boston Edison even concedes that it does not have sufficient information or proof that Babson College has somehow violated G.L. c. 164, § 1B(a) by virtue of its role in this matter. Boston Edison's Reply, at 10 n.7. Indeed, Boston Edison has indicated that it intends to conduct additional discovery on this issue. See id. In fact, as WMLP's Opposition is being drafted, Boston Edison still is issuing discovery requests. Therefore, Boston Edison must believe that important facts are still in dispute or it

would not have burdened the parties with additional discovery. WMLP also intends to issue additional discovery requests that will go to the very service territory issues that are crucial in determining the outcome of this case. Moreover, Boston Edison has only now filed a motion to join Babson College as a party in this proceeding. Plainly, this case is not ripe for summary judgment nor does Boston Edison seem to believe it is.

Furthermore, Boston Edison has not demonstrated that it has an exclusive right to serve Olin College. In fact, the Department's recent Order in Massachusetts Elec. Co. ("MECo"), D.T.E. 98-122 (2002) confirms that Olin College can choose its electricity provider. MECo stands for the proposition that municipal boundaries are not determinative in resolving service territory disputes. See Massachusetts Elec. Co., supra, at 7. In fact, the Department in its recent MECo Order was not persuaded by arguments similar to those made by Boston Edison in its Motion that municipal boundaries definitively establish service territories. In addition, the Department in MECo made a ruling completely opposite to Boston Edison's position set forth in its Motion that the Department precedent in Ecological Fibers, D.P.U. 95-171 (1985) and Boston Edison, EC 95-6 is no longer relevant in a border customer proceeding, such as the one in which WMLP, Olin College and Boston Edison are currently involved. Rather than support Boston Edison's position, the recent MECo Order undermines its reasoning behind its Motion. Boston Edison has not offered one shred of proof that Olin College engaged in any creative conveyancing in order to manipulate boundary lines or service territories. Indeed, it does not matter that a majority of Olin campus' property is located in Needham. The facts show that: (1) Boston Edison never has provided service to the Olin College site, which is at issue before the Department as provided in Olin College's Petition; (2) WMLP has served portions of Needham in the past, and of particular importance, (3) the property on which the Olin campus is located had been part of the Babson campus,

which WMLP always has served. Olin College purchased 100% of its property for which it is seeking to serve pursuant to its Petition from Babson College. See Olin College's Response to BE-1-3; WMLP Response to BE-2-3; WMLP response to BE-2-2, Exhibit 2, Mr. Joyce's June 21, 1999 letter to Mr. Milas. In fact, as set forth in this letter WMLP's service is closer to the Olin buildings and facilities before the Department than to Boston Edison's service. Had or if Babson College expanded its own campus on the Olin College site, there would be no question that WMLP would have had a right to serve that area.<sup>1</sup> Olin College, therefore, did not need to engage in any creative conveyancing to circumvent any service territory boundaries since its property never was in Boston Edison's exclusive territory.<sup>2</sup> Further, WMLP is capable of serving Olin College from points within Wellesley, which it will do. Even if it could not, and it can, MECo confirms that WMLP could extend its lines into Needham upon approval of the Department pursuant to G.L. c. 164, § 47. See id. at 10. Accordingly, Boston Edison's exclusive territory claims must fail if the Department were to make a ruling on this issue at this time. WMLP submits, however, that a ruling at this time is premature.

C. Boston Edison Confuses the Department's Jurisdiction to Resolve Service Territory Disputes with its Authority to Grant Equitable Remedies.

Boston Edison's argument regarding the Department's authority to grant the requested relief is misplaced. WMLP has not asserted that the Department lacks jurisdiction to resolve the service territory dispute. Rather, WMLP maintains that the Department lacks authority to grant Boston Edison's relief requested in its motion, which goes far beyond the resolution of this issue. Boston Edison's motion requests an interim Order directing WMLP and Olin College to cease and desist

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<sup>1</sup> If anything, this fact alone should entitle Olin College and WMLP to a finding of summary judgment that Olin College falls within WMLP's service territory.

<sup>2</sup> The extensive March 7, 2000 Collaborative Agreement between Olin College and Babson College shows that their

certain activities and to require Olin College to accept electric service from Boston Edison while Olin College's petition is pending. Boston Edison's request for relief is tantamount to a request for an injunction, which the Department has no power to grant. See, e.g., Holyoke Gas & Elec. Dept., D.P.U. 90-279, at 5 (1990). Once the Department issues an Order on Olin College's petition, and if the parties fail to comply with that Order on their own, then the Department can seek compliance with its Order pursuant to G.L. c. 164, § 79. The Department, however, has not issued a final Order and thus, Boston Edison's request for relief is premature, presumes the outcome of this case, and is tantamount to a request for the Department to grant equitable relief, which the Department has no power to grant.

D. Boston Edison Improperly Raises Issues Concerning Babson College in its Reply

Boston Edison's arguments concerning Babson College's role still do not change the fact that Boston Edison is not entitled to its request for relief in its Motion. Indeed, the fact that Boston Edison claims that Babson College somehow violates G.L. c. 164 underscores that Boston Edison has acted impulsively by requesting relief from the Department at this juncture. Boston Edison admits that it intends to pursue additional discovery, which shows that Boston Edison's Motion is premature. See Boston Edison's Reply, at 10 n.7. Moreover, this "resale" issue should not be resolved in Boston Edison's Motion but rather should be addressed, if at all, in the normal course of the proceeding. Furthermore, Babson College has had no opportunity to respond to Boston Edison's claims, and nor are they even relevant to whether Boston Edison is entitled to interim relief. WMLP has filed a separate response to Boston Edison's Motion to join Babson College as a party in this proceeding.

CONCLUSION

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arrangement was not to manipulate electric service territories.

For the foregoing reasons, the Wellesley Municipal Light Plant respectfully requests that the Department strike Boston Edison's Reply and deny its Motion for an Expedited Order to Maintain the Status Quo.

Respectfully submitted,

WELLESLEY MUNICIPAL LIGHT PLANT

By its attorneys,

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